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ALEXANDER L. STEVAS,

No. 80-2063

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SACKMAN-GILLILAND CORPORATION, *Petitioner,*

v.

CHELSEA TITLE AND GUARANTY COMPANY, *Respondent.*

**ON PETITION FOR
A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

SACKMAN-GILLILAND CORPORATION'S REPLY TO CHELSEA TITLE AND GUARANTY COMPANY'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF CITATIONS	ii
STATEMENT OF THE SCOPE OF SACKMAN-GILLILAND'S REPLY	1
ARGUMENT	1
A. The Nature of the Presumption	2
B. The Application of the Presumption	4
C. Assuming, Arguendo, a Presumption Exists, SG is Entitiled to Rebut It	7
D. If a Presumption Applies, Then SG Should Get the Normal Benefit of the Presumption	10
CERTIFICATE OF SERVICE	11

TABLE OF CITATIONS

CASES: Page

Andrews v. *Drew Municipal Separate School District*, 507 Fd. 611 (5th Cir. 1975) 9-10

Bobby Jones Garden Apartments, Inc. v. *Connecticut Mutual Life Insurance Co.*, 202 So.2d 226 (2nd DCA Fla. 1967) 6, 9

Builders Finance Co., Inc. v. *Ridgewood Homesites, Inc.*, 157 So.2d 551 (2nd DCA Fla. 1963) 8

City Building Corp. v. *Farrish*, 292 F.2d 620 (5th Cir. 1961) 5, 6

City of Sanford v. *Ashton*, 179 So. 765 (Fla. 1938) 5, 6

Cleveland Board of Education v. *LaFleur*, 414 U.S. 632 (1974) 10

Fara Manufacturing Co., Inc. v. *First Federal Savings & Loan Association of Miami*, 366 So.2d 164 (Fla. 3rd DCA 1979) 8

Kurkjian v. *Fish Carburetor Corporation*, 145 So.2d 523, 526 (Fla. 1st DCA 1962) 2, 8

Locke v. *Stuart*, 113 So.2d 402 (1st DCA Fla. 1959) 2, 9

McKenna v. *State*, 161 So. 561 (Fla. 1935) 10

Matz v. *O'Connell*, 155 So.2d 705 (2nd DCA Fla. 1963) . 4

Maudo, Inc. v. *Stein*, 201 So.2d 821 (3rd DCA Fla. 1967) and 171 So.2d 403 (3rd DCA 1965) 3, 4

Mercury Cab Owners' Association v. *Jones*, 79 So.2d 782 (Fla. 1955) 2

Provident National Bank v. *Thunderbird Associates*, 364 So.2d 790 (1st DCA Fla. 1978) 4, 5, 6

Spencer v. *American Advisory Corp.*, 338 So.2d 62 (3rd DCA 1976) 8

United Mercantile Agencies v. *Bissonette*, 19 So.2d 466 (Fla. 1944) 2, 9

Vanguard Construction Co. v. *Lewis State Bank*, 348 So.2d 72 (1st DCA Fla. 1977) 7

TABLE OF CITATIONS Continued

	Page
STATUTES AND RULES:	
F. S. § 45.031(7)	3, 7
F. S. § 702.02(5)	3, 4, 7
Rule 40, F.R.A.P.	1
MISCELLANEOUS:	
Chafee, 35 *Harv. L.Rev.*, 310-313 (1921)	2, 9
Morgan, "Instructing the Jury Upon Presumptions and Burden of Proof," 47 *Harv. L.Rev.* 59 (1933)	2
Morgan, "Presumptions," 12 *Wash. L.Rev.* 255	9

STATEMENT OF THE SCOPE OF SG'S REPLY

Petitioner, Sackman-Gilliland, asserts that a fair reading of the testimony and documentary evidence contained in the record of this cause supports the position set forth in its Petition. Therefore, it will not engage in a step-by-step refutation of the evidentiary arguments advanced by Respondent, Chelsea Title in its Brief in Opposition. It suffices to say that CT's arguments do not give SG the benefit of *any* favorable inferences to be drawn from the evidence and, thus, fail to deal with that evidence in the light of the standard established for the disposition of a motion for a directed verdict. See, e.g., *Brady* v. *Southern Railroad,* 320 U.S. 476, 64 S.Ct. 232, 88 L.Ed. 239 (1943).

There is a legal argument advanced by the Respondent as to the effect to be given the bid made by SG at the foreclosure sale of the subject property. There is absolutely no indication that the trial court paid any heed to said bid in granting the directed verdict. (See Appendix D on Page 92-11a of SG's Petition) Thus, any argument as to the effect of the bid is not responsive to the issue on appeal. In order to avoid confusion, however, the fallacy of CT's position on this point must be revealed.

ARGUMENT

CT would have this Court believe that there is a conclusive presumption in Florida law that the bid price at a foreclosure sale equates to the value of the property. Because SG bid $3,000,000.00 at said sale, CT reasons that such was the actual value of the property and SG sustained no damage. CT's reasoning is fallacious because there is no such presumption which has application in a suit for fraud and misrepresentation.

A. The Nature of the Presumption Arising From a Foreclosure Sale Bid.

Questions pertaining to presumptions are always governed by the law of the forum. *United Mercantile Agencies* v. *Bissonette,* 19 So.2d 466 (Fla. 1944). Under Florida law, a presumption is a preliminary "rule of law" which may be made to disappear by rebuttal evidence. A presumption is not itself "evidence." Furthermore, when there is positive evidence on the fact sought to be established by a presumption, the necessity for using the presumption disappears. *Locke* v. *Stuart,* 113 So.2d 402 (1st DCA Fla. 1959); *Mercury Cab Owners' Association* v. *Jones,* 79 So.2d 782 (Fla. 1955).

The presumption arising from the price bid at a foreclosure sale is a creature of Florida statutory law. Thus, proper application of the presumption demands understanding of its public policy basis. Unless that policy is involved in the case at bar, the presumption should not be applied. This is so because:

> "The existence of any given presumption and its exact nature and effect are not determined by the law of evidence but by the policies of that portion of the substantive law to which the presumption relates . . . Some rebuttable presumptions have no logical core, but rest on some policy of that particular branch of the substantive law with which they are connected." Chafee, 35 *Harv. L. Rev.* 310-313 (1921); and, see Morgan, "Instructing the Jury Upon Presumptions and Burden of Proof," 47 *Harv. L. Rev.* 59 (1933)

The only public policy purposes under Florida law for the presumption as to the amount bid at a foreclosure sale is to provide adequate consideration to support the title of the property in the purchaser. Also, in a deficiency suit the amount bid may be considered as one of the factors in valuation of the property. *Kurkjian* v. *Fish Carburetor Corporation,* 145 So.2d 523, 526 (Fla. 1st DCA

1962). The presumption, as established in F. S. § 45.031(7), provides as follows:

> "VALUE OF PROPERTY. The amount of the bid for the property at the sale *shall be conclusively presumed to be sufficient consideration for the sale.* Any party may serve an objection to the amount of the bid within ten days after the clerk files the Certificate of Sale. If timely objections to the bid are served, the objections shall be heard by the Court. Service of objections to the amount of the bid does not affect or cloud the title of the purchaser in any manner. If the case is one in which a deficiency judgment may be sought, an application is made for a deficiency, *the amount bid at the sale may be considered by the court as one of the factors in determining a deficiency under the usual equitable principles.*" (Emphasis added)

F. S. § 45.031(7) merely codifies what the common law was prior to the enactment of its predecessor statute, F. S. § 702.2(5).

The Court is urged to note that neither the current statute nor its predecessor establishes a conclusive presumption as to fair market value. It simply provides that the foreclosure sale price will be deemed adequate consideration to support title. This is a far cry from equating the bid with actual market value as the Florida courts have always recognized. For example, in *Maudo, Inc.* v. *Stein,* 201 So.2d 821 (3rd DCA Fla. 1967), a deficiency action, a mortgagee successfully bid $500 for property with an actual value of $55,000 to $60,000. While there was no attack on the sale based on adequacy of sale price, by operation of F.S. § 45.03(7) and/or its predecessor statute, the sale price, absent a timely objection, would have been conclusively presumed *adequate to support title* in the mortgagee. Significantly, in an earlier appeal from the same case, the *Maudo* court held, however, that the $500 bid did *not* establish value for purposes of assessing a deficiency and the mortgagor was allowed to introduce

evidence as to *actual market value. Maudo, Inc.* v. *Stein,* 171 So.2d 403 (3rd DCA Fla. 1965).

Likewise, *Matz* v. *O'Connell,* 155 So.2d 705 (2d DCA Fla. 1963), held that the trial judge erred in ruling that the amount bid at the sale conclusively established value under the language of F.S. Sec. 702.02(5). Construing the statute, the Court stated:

> "Section 702.02(5), Florida Statutes, F.S.A., enacted subsequent to the decision cited, *does nothing more than eliminate the necessity of a confirmation by the court of the sale when no objection thereto has been filed.* Thus, by operation of the foregoing statute, when no objection is filed it is presumed conclusively that the sale price is adequate *to support the title to the property in the purchaser,* even without a confirmation of the sale by the court." *Id.* at 707 (Emphasis added)

Thus, the Court should not give to this statutory presumption application more far-reaching than that allowed by Florida law. The simple fact is that no law conclusively equates bid price to value.

B. The Application of the Presumption.

Thus, the presumption is to apply in suits between debtors and creditors where validity of the sale is challenged for inadequacy of the price, and also, in deficiency suits by creditors to establish the difference between the amount of damages awarded in a Final Judgment and the fair market value of the subject property. See, e.g., *Maudo, Inc.* v. *Stein, supra;* and *Matz* v. *O'Connell, supra.*

No Florida case or statute authorizes application of this presumption in any other context than that discussed above. This is demonstrated by the only cases on this issue cited by CT. For example, *Provident National Bank* v. *Thunderbird Associates,* 364 So.2d 790 (1st DCA Fla. 1978) involved a *suit for a deficiency* judgment by a *second*

mortgagee against a mortgagor and guarantor. The second mortgagee sought to show that the property bought at the foreclosure sale was of lower value than its bid and that its deficiency should thus be greater than the difference between the bid price and the amount of the Final Judgment. The *Provident* Court rejected the mortgagee's theory and held for purposes of establishing a *deficiency:*

> "Although the amount for which mortgaged property sells at a properly conducted foreclosure sale is *not conclusive as to the value of the property* nor the right to a deficiency judgment, the *deficiency* may not exceed the difference between the amount for which the property so sold and the amount of the indebtedness secured by the final judgment of foreclosure." *Id.* at 795 (Emphasis added)

In light of the prior discussion of the nature of the presumption arising from the bid price, the *Provident* ruling stands clearly for three principles: (1) The bid price is *not* presumed equal to value; (2) The effect given to the bid price is to place a ceiling on the amount of a deficiency decree and (3) the effect is implicitly *limited to deficiency actions. Provident* most certainly does *not* mean that a third party accused of fraud may rely on the bid price to establish value so as to defeat a damage claim. Likewise, the other two cases cited by CT, *City of Sanford* v. *Ashton,* 179 So. 765 (Fla. 1938) and *City Building Corp.* v. *Farrish,* 292 F.2d 620 (5th Cir. 1961) also provide no support for CT's argument.

In *Ashton,* a judgment creditor had City property sold at a sheriff's sale and bid it in for $1000. The City challenged the sale on the ground that the consideration paid was inadequate since the City valued the property at $100,000. The Court's denial of the City's challenge did not in any way equate the bid price to the value of property but merely upheld the sanctity of the sheriff's sale by ruling that, absent a showing of fraud or other similar defect in the sale, the amount bid was sufficient con-

sideration to support title in the judgment creditor *regardless* of whether the bid bore any relation to actual value. In that regard the Court wryly noted that: "Bidders and buyers at execution sales usually bid and buy to make a profit." *Id.* at 767.

The same basic holding was rendered in *Farrish*. There a tenant's trustee in bankruptcy challenged the adequacy of the sale price paid by the landlord for tenant's property sold at a court-ordered distress sale. The Fifth Circuit, applying Florida law and the *Ashton* precedent, held that even if the bid were inadequate the sale would stand:

> "In the absence of fraud, misconduct, mistake, accident, surprise, or irregularity, a judicial sale will not be set aside where the consideration for the property sold is inadequate." *Id.* at 622.

Thus, like *Provident, Farrish* and *Ashton* simply do not establish any presumption relating bid price to actual value, the purpose of the latter two cases being to preserve judicial sales, regardless of bid price, where there is no misconduct involved in those sales. In fact, no Florida case or statute exists which conclusively presumes that the bid price equates to value. Rather, the bid price is only (1) "some evidence of value" for purposes of determining a deficiency amount; or, (2) presumed sufficient to provide adequate consideration for a regularly conducted judicial sale without regard to actual value of the property purchased.

There is no authority for the proposition that market value conclusively equates to the bid price. Perhaps the reason why no such rule exists is best set forth in *Bobby Jones Garden Apartments, Inc.* v. *Connecticut Mutual Life Insurance Co.*, 202 So.2d 226 (2nd DCA Fla. 1967):

> "Finally, we are convinced that a *judicial holding that the bid price* at the foreclosure sale *conclusively establishes the market value* of the property for purposes of deficiency decree would expose the foreclosure pro-

> cedure to shocking and pernicious inequities in many cases. *It is common knowledge that frequently mortgagees do not bid anywhere near the market value of the property or the amount of the obligation at foreclosure sales.*" *Id.* at 230. (Emphasis supplied)

Indeed, the bid price is often given little or no effect in a deficiency suit. *Vanguard Const. Co.* v. *Lewis State Bank,* 348 So.2d 72 (1st DCA Fla. 1977) is a case in point. There the Bank sought a deficiency. The issue of value of the property and the Bank's evidence of same was squarely before the Court and it held:

> "The amount of the appraisal which the Bank secured before making the loan did not, as a matter of law, foreclose the Bank from proving in deficiency proceedings that the market value of the property foreclosed and bought in for a nominal bid was less than the appraisal." *Id.* at 74.

Thus, despite the availability of the presumption, a mortgagee may be allowed to introduce evidence to show a market value different from the bid price.

Likewise, as to the presumption of F.S. § 45.031(7) and its predecessor § 702.02, there is no authority which makes it applicable outside of the narrow context of suits for deficiencies, or suits challenging the efficacy of judicial sales. Recalling Prof. Chafee's above-quoted article, there is no public policy reason why the presumption should be applied in any broader context.

C. Assuming, Arguendo, a Presumption Exists, SG is Entitled to Rebut It.

There is Florida case law based on F. S. § 45.031(7) or its predecessor that the amount bid by a mortgagee at a foreclosure sale is "one factor" or "some evidence" to be considered in determining market value for purposes of determining the Mortgagee's entitlement to a deficiency decree and the amount of the decree. However, the

bid is not conclusive on the issue of market value. See, e.g., *Builders Finance Co. Inc.* v. *Ridgewood Homesites, Inc.*, 157 So.2d 551 (2d DCA Fla. 1963); *Kurkjian* v. *Fish Carburetor Corp., supra;* and, *Spencer* v. *American Advisory Corp.*, 338 So.2d 62 (3rd DCA Fla. 1976). As to the effect of evidence of the sale price in a deficiency suit, it has been held as follows:

> "The rule is clearly that the price bid, and for which realty is sold, at a mortgage foreclosure sale, although conclusive with regard to the efficacy of sale in absence of timely objection thereto, is not necessarily conclusive with regard to the value of property sold on application for a deficiency degree . . . *The proper rule is that upon the introduction of the evidence of the sale price, the defendant has the burden of going forward and presenting such evidence as he shall find proper concerning the fair market value of the property.* In the absence of such evidence, the trial court has the power to act upon the assumption that the sale price reflects the fair market value. *Fara Manufacturing Co., Inc.* v. *First Federal Savings & Loan Association of Miami,*" 366 So.2d 164 (Fla. 3rd DCA 1979). (Emphasis added)

The rule embodied in *Fara* has developed wholly within the context of deficiency suits. It does not exist elsewhere in Florida law. There is no basis for its application in a suit for fraud.

Assuming, however, that this presumption were to be applied to the instant fraud case, several points must be made.

First, *Fara Manufacturing* makes clear that evidence of the bid price introduced by one party merely shifts the burden of going forward with the evidence to the party who seeks to show that it is not equal to the fair market value. It is incumbent upon that party to introduce evidence of actual market value — i.e., to rebut the presumption of value created by the bid price.

In the case at bar, CT seeks to use evidence of the sale price against SG to defeat its damage claim. Since CT seeks to rely on the presumption of value arising from SG's bid, SG is entitled to introduce evidence to rebut the presumption and establish actual value. SG's right to do this is fundamental to the law of evidence as applied in Florida and elsewhere. *Locke* v. *Stuart, supra;* Chaffee, 35 *Harv. L. Rev.* 310-313 (1921); Morgan, "Presumptions," 12 *Wash. L. Rev.* 255 at 260-61 (1937).

Indeed, since the presumption as it has arisen in deficiency suits is rebuttable, if the Court were to deny SG the right to have the trier of fact consider its positive rebuttal evidence of value, then the Court would be taking the wholly unprecedented step of converting an otherwise rebuttable presumption into a conclusive presumption that bid price equals market value.

Such action violates the rule that presumptions are established by the law of the forum since there is no such conclusive presumption in Florida. *United Mercantile Agencies* v. *Bissonette, supra.* Furthermore, in the face of SG's positive evidence of value there is no reason to apply any presumption under Florida law. *Locke* v. *Stuart, supra.* Certainly no public policy dictates the application of such a presumption to this case.

Furthermore, it is well recognized that the bid price usually deviates from actual market value. *Bobby Jones Garden Apartments, Inc.* v. *Connecticut Mutual Life Ins. Co., supra.* SG's evidence is that the market value was far less than the bid price. That being the case, to impose upon SG a conclusive presumption that the bid price equals market value is violative of due process. In this regard, it has been held that:

> "Due process interdicts the adoption by a state of an irrebuttable presumption, as to which the presumed fact does not necessarily follow from the proven fact." *Andrews* v. *Drew Municipal Separate School*

District, 507 F.2d 611 (5th Cir. 1975); see also *Cleveland Bd. of Education* v. *LaFleur*, 414 U.S. 632 (1974).

Additionally, it would be error to utilize a presumption to dispose of this case in the face of positive evidence contrary to the presumed fact. Under Florida law, the trier of fact should not weigh a presumption in deliberating on a case but should weigh the evidence and the evidence only. *McKenna* v. *State*, 161 So. 561 at 563 (Fla. 1935). If the *McKenna* rule is applicable to deliberations at the close of a case, it is even more applicable in a trial judge's deliberation on a Directed Verdict motion where all evidence of the Plaintiff, as well as inferences to be drawn therefrom, are to be viewed in the light most favorable to Plaintiff's case. For the trial judge to give such weight to an artificial presumption at the directed verdict stage as to preclude SG's positive evidence of value is clear error.

D. If a Presumption Applies Then SACKMAN-GILLILAND Should Get the Normal Benefit of the Presumption.

Finally, if any such presumption applies then SG should receive the full benefit of its application. The presumption CT seeks to apply, given its logical application, establishes SG's damage as the difference between the amount of the foreclosure final judgment — $3,586,727.66 — and the amount of its bid — $3,000,000.00 — for a total of $586,727.66, plus costs and interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail/hand delivery to THOMAS DeWOLF, ESQUIRE, 1475 Hartford Building, Orlando, Florida, this 13th day of July, 1981.

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